IN THE

Supreme Court of the United States

October Term, 1965

No. 412

SALVATORE SHILLITANI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, N. Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

INDEX

Authorities Cited

Cases

Statutes

PAGE

Rules Cited

IN THE

Supreme Court of the United States

October Term, 1965

No.

SALVATORE SHILLITANI,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Salvatore Shillitani, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circut entered against him in the above entitled case on May 18, 1965.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on May 18, 1965. On the 29th day of June, 1965, Mr. Justice John M. Harlan, granted an order extending the time of

the petitioner to file his petition for a writ of certiorari to and including August 3, 1965. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically raised by the petitioner Salvatore Shillitani, are:

I. Was the appellant denied his constitutional right to indictment and trial by jury?

II. Does the "admixture of civil and criminal contempt" invalidate the judgment of conviction?

III. As the appellant is presently on Federal parole, is the grant of immunity to the appellant as broad as the privilege against self-incrimination?

IV. Did the lower Court err in finding that the questions propounded to the appellant were material and pertinent?

D. Constitutional Provisions and Statutes Involved

Fifth and Sixth Amendments to the United States Constitution. United States Code, Title 18, Sections 1 and 1406.

All of the foregoing are set forth in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

The appellant, Salvatore Shillitani, was subpoenaed on February 3, 1964, to testify before a Grand Jury within the

Southern District of New York on February 12, 1964, in regard to an alleged violation of Section 371 of Title 18, United States Code. Shillitani appeared on that day, and invoking his constitutional privilege against self-incrimination, refused to answer certain questions. On April 22, 1964, Shillitani again appeared before a Grand Jury and invoked his constitutional privilege against self-incrimination in respect to certain questions then propounded. Shillitani appeared before a Grand Jury on May 6, 1964, and again invoking his constitutional privilege against self-incrimination, refused to answer certain questions. On July 1, 1964, immunity under Section 1406, Title 18, United States Code, was conferred upon Shillitani by Hon. Inzer B. Wyatt, United States District Judge. Shillitani contends, and factually it is more fully developed in Point One hereafter, that he was not then directed to answer the questions propounded, and instead, Judge Wyatt deferred any action until a subsequent date (D. App. 26). On July 2, 1964, and on August 4, 1964, Shillitani was returned directly to the Grand Jury and not to the Court. He again invoked his constitutional privilege against self-incrimination. On August 4, 1964, Shillitani again appeared before the Grand Jury, and the same situation as before prevailed. Thereafter he was taken before the Hon. Lloyd F. MacMahon, and a hearing to inquire into his alleged contempt was set down to be had on August 10, 1964.

A hearing was conducted and under the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, Shillitani was adjudged in contempt of Court in violation of Title 18, United States Code, § 401.

F. Reasons for Granting Writ

I.

The appellant was denied his constitutional right to indictment and trial by jury.

In *Harris* v. *United States,* 334 F. 2d 460 (2 Cir. 1964), cert. granted, 379 U.S. 944 (Dec. 14, 1964), the petition for a writ of certiorari was granted but limited to the following questions:

1. Whether petitioner was afforded a proper and fair hearing for criminal contempt under Rule 42(2) of the Federal Rules of Criminal Procedure, and whether *Brown* v. *United States,* 359 U.S. 41, should be reconsidered and overruled by this Court?

2. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt, where he has been sentenced to one year impisonment?

3. Whether the sentence of one year imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible?

The facts in this matter are so within the questions which this Court will be considering in *United States* v. *Harris,* that the United States Court of Appeals for the Second Circuit delayed its decision for six months, stating:

> "We delayed our decision in this case, in the hope of receiving guidance from the Supreme Court on several of the issues raised by defendant. See United States v. Harris, 334 F. 2d 460 (2 Cir. 1964), cert. granted, 379 U.S. 944 (Dec. 14, 1964). It now appears that the Supreme Court will not hear argument on Harris during the present term. . . ."

(United States v. Shillitani, Slip Opinion, Footnote 1, p. 2123)

It would be unnecessarily repetitious to argue at length the grounds which have already been offered before this Court in *United States* v. *Harris, supra.* The petitioner here urges *United States* v. *Harris, supra,* as good and sufficient reason for granting the writ requested here.

II.

The "admixture of civil and criminal contempt" invalidates the judgment of conviction.

Shillitani specifically raises as an issue here, and as one which invalidates his conviction, the odd "admixture of civil and criminal contempt." *Reina* v. *United States,* 364 U.S. 507.

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public."
>
> *McCrone* v. *United States,* 307 U.S. 61.

> "But if it (the punishment) is for criminal contempt the sentence is punitive, to vindicate the authority of the Court."
>
> *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418.

Imprisonment as a fact does not differentiate the two classes of contempt, but the means of terminating the imprisonment may serve as identifying indicia. The United States Supreme Court explained by careful example in

Gompers v. *Buck's Stove & Range Co., supra,* that the touchstone of the civil contempt is the requirement upon the defendant to perform a certain act, and upon performance of such act, the ending of the commitment.

Mr. Justice Black, with who Chief Justice Warren concurred, wrote in a separate dissenting opinion in *Reina* v. *States, supra,* that:

> "The Court affirms a conviction for contempt of court upon which petitioner has been sentenced to imprisonment for two years with the provision that he can purge himself of the contempt if he answers the questions propounded to him within 60 days. This is a strange kind of sentence, apparently combining in one judgment the elements of both civil and criminal contempt. This fact alone is sufficient to arouse grave doubts in my mind as to the validity of the judgment, since civil and criminal contempt procedures are quite different and call for the exercise of quite different judicial powers. Moreover, analysis of this judgment makes it clear that it rests upon the motion that petitioner has as yet committed no crime and is being sentenced for civil contempt for the sole purpose of coercing his compliance with the demand for his testimony, but that if he fails to comply with this demand within the specified period, he will have committed a criminal contempt. Thus the judgment seems to represent a present adjudication of guilt for a crime to be committed in the future.
>
> *Reina* v. *United States, supra,* at p. 515.

The close parallel between the *Reina* case and this case is thus highlighted. The problems posed there are present here, but are compounded many times over, because Judge

Dawson in sentencing Reina specifically set forth a purge period and characterized it as a purge period. The sentence of Shillitani in pertinent parts is:

> "The Court: Mr. Shillitani, would you rise, please. I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you.
>
> The sentence of the Court is that having found that Mr. Salvatore Shillitani is guilty of criminal contempt in that he wilfully disobyed the lawful order of this Court by his refusal to answer questions which he was ordered and directed by this Court to answer, it is ordered and adjudged that Salvatore Shillitani is hereby remitted to the custody of the Attorney General or his authorized representative for two years imprisonment, or until the further order of this Court. Should the said Mr. Salvatore Shillitani answer before the grand jury the questions which appear on the record and which he was ordered to answer and should Mr. Shillitani answer those questions before the expiration of said sentence, or the discharge of the said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment.
>
> The defendant will be remanded forthwith" (*Transcript, August 10, 1964*, pages 23 and 24).

If Shillitani were to now appear before the Grand Jury and answer the questions which were the subject matter of that proceeding, has he purged himself? Is his imprisonment terminated, or *may* it be terminated? It is not intended to play with words, or attempt to find unnatural or

unreal meanings to the terms employed by the Court in sentencing Shillitani. The very words used are conditional, and not conditional upon Shillitani's acts, but merely a reservation by the Court of the power to terminate a sentence.

The remedial nature of the civil contempt sentence is lost upon compliance by the contemnor and continuance of imprisonment. Then the only reason for imprisonment is the vindication of the authority of the Court which is punishment for criminal contempt. It cannot be determined from the sentence imposed upon Shillitani whether his sentence is one of civil contempt or criminal contempt, and to subdivide the sentence into portions so that one might argue whatever time Shillitani spends in prison prior to compliance is a civil contempt, and he may be relieved of the criminal contempt subsequent to compliance upon appropriate application to the Court, dodges the issue presently before this Court. To repeat, the issue is a determination as to what is the sentence imposed upon Shillitani. The sentence is neither fish nor fowl. It cannot be subdivided as the sentence in *Cliett* v. *Hammonds,* 305 F. 2d 565 (5th Cir. 1962). The nature of the beast with which we deal here is different. In that case there was a clear division of thirty days sentence imposed as a civil contempt, and ninety days thereafter as a criminal contempt.

Shillitani is entitled to know exactly what his imprisonment is. To relegate him to the uncertainty of the future in the event that he chooses to respond to the questions posed, in truth, gives birth to a cross-breed of civil and criminal contempt.

III.

As the appellant is presently on federal parole, the grant of immunity to the appellant is not as broad as the privilege against self-incrimination.

Shillitani is presently serving on Federal parole the balance of a fifteen year sentence. He commenced parole upon reaching his mandatory release date in December of 1959. However, his release from Federal incarceration just meant further New York State incarceration until May of 1960, when he was discharged from State custody. Since May of 1960, he has continued on Federal parole without violation.

Shillitani contends that Section 1406 of Title 18, United States Code, does not cloak him with immunity from action by the Parole Commission predicated upon charges derived from his compulsory testimony before the Grand Jury.

To offer Shillitani surcease from his fears of being found a parole violator by reciting to him that portion of Section 1406 of Title 18, United States Code, which provides:

> "No such witness shall be . . . subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled . . . to testify or produce evidence . . ."

is little comfort in a jail cell.

These high rolling phrases are not the key to a door or a passport to freedom. No law is self operating. To have a right without a remedy is like having a bow without a string. The remedy available to one claiming injury as a result of or from testimony coerced under any immunity statute is in the exclusionary rule.

> "18. Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence."
>
> *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 12 L. ed. 2d 678, 695.

A motion to suppress and a shifting of the burden of proof may well suffice to protect a defendant in a Federal criminal prosecution brought in the District Courts subject to the Federal Rules of Criminal Procedure, and historic case law implementing constitutional and statutory safeguards. *No such remedy is available to Shillitani.*

The rights of a parolee to contest an alleged violation do not include a hearing limited by adherence to trial rules of evidence, confrontation of witnesses, cross-examination, and the right to compulsory process.

> "In accord with this generally accepted view of the nature of parole as an integral part of the rehabilitation process, we hold that due process does not require the Board to allow cross-examination of its sources of information in parole revocation proceedings."
>
> "As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violation. It is the established practice of the Board to consider all communications, i.e., affidavits, letters, telegrams, prison records, even though hearsay in the strict evidentiary sense, in reaching a

conclusion. This flexibility affords greater protection to alleged violators than would be allowed in an adversary proceeding with conventional rules of evidence. It permits the Board to consider all relevant information which may be helpful to the parolee. To hold that compulsory process is constitutionally required would imply that revocation hearings are comparable to criminal prosecutions rather than to administrative processes within the framework of prisoner rehabilitation and penal administration. Our treatment and directives relating to the preliminary interview later in this opinion will ameliorate some of the handicaps which confront a parolee upon his arrest for parole violation."

Hyser v. *Reed*, 318 F. 2d 225, at 238 and 240.

The fictional veil of secrecy surrounding Grand Jury proceedings may serve to deter a zealous prosecutor from making available to the Parole Commission the transcript itself of the coerced testimony. Yet, only astounding naivete would permit the childish clinging to the unspohisticated belief that the matters presented to the Grand Jury would not proceed through devious pathways and circuitous routes to the door of the Parole Commission. A Court may direct that the transcript not be available for use against the parolee, but, in what manner may the parolee protect himself from employment of the fruits of the transcript when he is without power to contest by cross-examination, compulsory process, and confrontation of witnesses, the alleged parole violation, and its source.

At least in this area the immunity conferred under Section 1406 of Title 18, United States Code, is no co-extensive with the privilege against self-incrimination.

IV.

The lower court erred in finding that the questions propounded to the appellant were material and pertinent.

The right of the Grand Jury to inquire into criminal activities and to conduct investigations on its own motion is too well established to even require citing of authorities. Similar to all powers, whether granted in Governmental charter or reserved to the People, limitations are imposed or inherent in their exercise.

> " 'Not by rumors and reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury.'
>
> Similar language was used in United States v. Kimball, 117 Fed. 156-161; United States v. Reed, 2 Blatchf. 449, Fed. Cas. No. 16,134; United States v. Terry, 39 Fed. 355. And in Frisbie v. United States, 157 U.S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, it is said by Mr. Justice Brewer:
>
> 'But in this country it . . . is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment.'
>
> There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view, and in a spirit of meddlesome

> inquiry. In the most pertinent of these cases (Re Lester, 77 Ga. 143), the mayor of Savannah, who was also ex officio the presiding judge of a court of record, was called upon to bring into the superior court the 'Information Docket' of his court, to be used as evidence by the state in certain cases pending before the grand jury. It was held 'that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well-defined limits. . . . The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense.''
>
> *Hale* v. *Henkel,* 201 U.S. 45, at 64.

As one of the predicates for finding Shillitani in contempt, Judge MacMahon determined that the questions which Shillitani refused to answer were material and pertinent to the investigation then being made. Transcript, August 10, 1964, at 19. Absent such finding, it is fair to assume that Shillitani would not have been convicted of contempt.

Shillitani does not urge under this point that he has the right to set limitations upon the Grand Jury's inquiry. Cf. *Blair* v. *United States,* 250 U.S. 273. He does urge, however, that he cannot be deprived of his liberty for failure to answer questions which are "meddlesome inquiry."

Some twenty-two of the questions put to Shillitani would be fare for backfence gossip. He had been confined to Federal prison in 1951. He was continuously in prison until May of 1960. Shillitani could no more testify to facts

concerning the machinations of Guiseppe Cotroni or Antronuk Paroutian, than the Grand Jury could obtain "factual testimony" about Guiseppe Cotroni or Antronuk Paroutian by reading True Confessions or Popular Detective. Guiseppe Cotroni was arrested in Montreal, Canada, in July of 1959, and not released thereafter. Antronuk Paroutian was extradited from Lebanon in or about 1959, and similarly, has been continuously confined. See *United States* v. *Bentvena*, 319 F. 2d 916 (2nd Cir. 1963). The pertinency of Shillitani's testimony in regard to his own activities in 1951 is to state the obvious, thirteen years removed from the date of inquiry and eight years from the Statute of Limitations. The lack of concern for factual inquiry is further grotesquely illustrated. A series of questions were posed to Shillitani concerning the indictment and the prosecution of Paroutian in the Southern District of New York. The fact that he was tried and convicted in the Eastern District of New York did not deter the questioner. See *United States* v. *Paroutian*, 299 F. 2d 486 (2nd Cir. 1962).

The ultimate purpose of the Grand Jury is to return an indictment, not to extract a cleansing confession from the witness. Shillitani could testify to no fact within the legal meaning of the term in and about the above described areas of inquiry. Therefore, the constitutional purpose of the Grand Jury was subverted, and instead it was used as a rack upon which the witness must cry his confession, or be confined for years without statutory or constitutional limit.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 182—September Term, 1964.

(Argued November 13, 1964 Decided May 18, 1965.)

Docket No. 29117

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE SHILLITANI,

Appellant.

Before:

LUMBARD, *Chief Judge,*
SWAN and WATERMAN, *Circuit Judges.*

Appeal from judgment of conviction for criminal contempt of court, and from conditional sentence of two years imprisonment, United States District Court for the Southern District of New York, MacMahon, J., sitting without jury. Affirmed.

ANDREW M. LAWLER, JR., Asst. U. S. Attorney (Robert M. Morgenthau, U. S. Attorney, John E. Sprizzo, Asst. U. S. Atty.), *for Appellee.*

ALBERT J. KRIEGER, New York City, *for Appellant.*

Appendix A—Opinion of United States Court of Appeals

WATERMAN, *Circuit Judge*:

Defendant appeals from a judgment of conviction for criminal contempt of court, and from a conditional sentence of two years imprisonment, imposed upon him by Judge MacMahon, sitting without a jury, in the United States District Court for the Southern District of New York. We affirm.

In September 1963, a grand jury was impaneled in the Southern District of New York to investigate violations of the federal narcotics laws. The grand jury became particularly interested in the supposed illicit activities of an alleged ring headed by Thomas Luchese. In the belief that defendant was a member of the ring, the grand jury summoned him to give testimony. Defendant appeared before the grand jury on February 12, April 22, and May 6, 1964. On each occasion he refused to answer certain questions on the ground that his replies might tend to incriminate him.

On July 1, 1964, the government applied to Judge Wyatt, pursuant to 18 U. S. C. §1406, for an order granting defendant immunity and directing him to respond to the questions. Judge Wyatt advised defendant, "[F]ull and absolute immunity is being granted to you with respect to all matters on which you are compelled to testify." He then told defendant, "I direct that you appear before this Grand Jury, and that you study these [fifty-three] questions, and that you answer each and every one of these questions." Nonetheless, on July 2 and August 4, 1964, defendant again declined to respond to the questions on the ground that his replies might tend to incriminate him.

Upon notice and an order to show cause, defendant was brought before Judge MacMahon on August 10, 1964, pursuant to Fed. R. Crim. P. 42(b), for a hearing on a charge that he was in criminal contempt of court. At the conclusion of the hearing Judge MacMahon found defendant guilty and imposed sentence under 18 U. S. C. §401. He ordered defendant imprisoned for two years, with a proviso that the sentence might be prematurely terminated if defendant should obey the order of Judge Wyatt. Defendant appeals both the conviction and the sentence.[1]

First. Defendant claims that Judge Wyatt never gave an unequivocal order that he testify before the grand jury, and that he never understood himself to be under such an order. It appears that after Judge Wyatt directed defendant to answer the fifty-three questions, defendant asked for time to consult with counsel. Judge Wyatt granted the request and deferred further proceedings until the following day. The next morning defendant was taken directly before the grand jury, where the questions were propounded to him by the government. Defendant contends that Judge Wyatt meant, instead, for defendant to appear again before *him*, the judge, so that, after defendant had received legal advice, the judge would then issue a binding order. Defendant also contends that this was what he understood the judge to mean.

---

[1] We delayed our decision in this case, in the hope of receiving guidance from the Supreme Court on several of the issues raised by defendant. See *United States* v. *Harris*, 334 F. 2d 460 (2 Cir. 1964), *cert. granted*, 379 U. S. 944 (Dec. 14, 1964). It now appears that the Supreme Court will not hear argument on *Harris* during the present term. 33 U. S. L. Week 3335-36 (April 13, 1965).

It is true that there can be no violation of an order to testify unless the court "unequivocally" directs the witness so to do. *Brown* v. *United States,* 359 U. S. 41, 50 (1959). Furthermore, the defendant must be made aware that the order has been issued. See *Green* v. *United States,* 356 U. S. 165, 173-79 (1958). Upon an examination of the entire colloquy with Judge Wyatt, however, we are satisfied that the judge meant only to give defendant time to consult with counsel prior to his next appearance before the grand jury. Moreover, we are satisfied that this was what defendant understood the judge to mean at the time, for defendant never raised his present objection during the grand jury proceedings on July 2 and August 4, 1964, even though on each occasion the government interrogator reminded him of Judge Wyatt's order. Cf. *Piemonte* v. *United States,* 367 U. S. 556, 560 (1961); *United States v. Rinieri,* 308 F. 2d 24, 26 (2 Cir.), *cert. denied,* 371 U. S. 935 (1962).

Second. Defendant, who at the time of these events was on parole under a sentence imposed after a prior conviction, claims that the order violated his privilege against self-incrimination, because immunity from prosecution pursuant to 18 U. S. C. §1406 would not protect him from the use of his grand jury testimony in a proceeding to revoke his parole. The immunity granted by 18 U. S. C. §1406, however, is as broad as the privilege against self-incrimination. *Reina* v. *United States,* 364 U. S. 507, 514 (1960). If the constitutional privilege applies to parole revocation proceedings, a point we need not now decide, the immunity statute would bar use of defendant's testimony therein. See *Ullmann* v. *United States,* 350 U. S. 422, 430-31 (1956).

Defendant contends that even if he is covered by the immunity statute he would be unable to vindicate his rights thereunder because parolees are not entitled to summon witnesses by subpoena or to confront adverse witnesses in parole revocation hearings. Assuming that defendant has correctly described parole revocation procedures, we are satisfied that he enjoys other guarantees which adequately protect his rights under the immunity statute. Grand jury proceedings cannot be disclosed to a parole board without a court order which the parolee would be entitled to oppose. See Fed. R. Crim. P. 6(e); cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395, 399-400 (1959). Furthermore, parole cannot be revoked under 18 U. S. C. §4207 without notice of charges to the parolee and an opportunity to be heard thereon. See *United States ex rel. Frederick* v. *Kenton,* 308 F. 2d 258 (2 Cir. 1962); *United States ex rel. Buono* v. *Kenton,* 287 F. 2d 534 (2 Cir.), *cert. denied,* 368 U. S. 846 (1961). If the charges should relate to matters about which the parolee has testified under a grant of immunity which covers parole revocation hearings, the government would have the burden of showing that its evidence was derived from a source other than the immunized testimony. Cf. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 79 n. 18 (1964). The possibility that these numerous guarantees will be evaded, through the secret bad faith connivance of the government and the parole board, is too remote to bar application of the immunity statute to a parolee.

Third. Defendant claims that Judge Wyatt's order was improper, because many of the questions he was directed

to answer were irrelevant to any possible violation of the federal narcotics laws enumerated in 18 U. S. C. §1406, and were merely designed to elicit gossip or to obtain from him a confession of his own guilt. We are reluctant, however, to circumscribe grand jury proceedings by rigid tests of relevance. See *Blair* v. *United States*, 250 U. S. 273, 282 (1919); *United States v. Harris, supra* at 462-63. Upon an examination of the questions defendant was directed to answer, we are satisfied that all of them were appropriate to a grand jury investigation into possible violations of the federal narcotics laws covered by the immunity statute.

Fourth. Defendant claims that the sentence of two years imprisonment was improper, because he had not been indicted by a grand jury on the charge of criminal contempt. See *Green* v. *United States, supra* at 183. He also claims that the sentence was improper because he had not been tried by a petit jury. See *United States* v. *Barnett*, 376 U. S. 681, 694 n. 12, 725-28, 753-60 (1964). Defendant refers us to the appellant's brief in *United States* v. *Castaldi*, No. 29043, 2 Cir., Sept. 25, 1964, for an elaboration of the arguments.

Our decision in *Castaldi*, 338 F. 2d 883, 885 (2 Cir. 1964), *petition for cert. filed*, 33 U. S. L. Week 3223 (Dec. 17, 1964), furnishes a complete answer to these contentions. Inasmuch as the contempt proceedings preceded any compliance with Judge Wyatt's order, and because defendant's sentence contained a purge clause, it is the present rule of our circuit that he could be sent to prison for two years without having been tried by a petit jury. Cf. *United States* v. *Harris, supra* at 463-64. For the same reasons,

it was unnecessary that he be indicted by a grand jury. See *Green* v. *United States, supra* at 184-85, 187.

Fifth. Defendant claims that the sentence imposed upon him was improper, inasmuch as it contained a purge clause characteristic of a civil contempt, whereas his conviction was for criminal contempt. He contends that this impropriety was compounded by the fact that the purge clause is discretionary, and thus the court may choose not to terminate his imprisonment even if he should comply with Judge Wyatt's order.

It is true that the Supreme Court has suggested that a sentence reflecting "an admixture of civil and criminal contempt" might raise arguable legal issues. *Reina* v. *United States, supra* at 515. We construe the judgment in this case, however, to mean that defendant has an unqualified right to be released from prison once he obeys Judge Wyatt's order. As thus construed, the sentence was entirely proper. *United States* v. *Castaldi, supra* at 885; see *United States* v. *Rinieri, supra* at 25.

Affirmed.

APPENDIX B

Statutes Involved

UNITED STATES CONSTITUTION

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: . . ."

TITLE 18, UNITED STATES CODE

SECTION 1. Offenses Classified

Notwithstanding an Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than $500, or both, is a petty offense.

SECTION 1406. Immunity of Witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h) or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor

shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, C. 629, Title II, §201, 70 Stat. 574.